MOTION FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-129

GARY SUCHY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI

— — —

AMENDED AND SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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MOTION FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI

Petitioner moves for leave to file Amendments and Supplements to his Petition for Certiorari for the following reasons:

1. The jurisdictional statement is inaccurate and needs to be corrected.

2. Question I, in substance if not in form[1], presents a simple sufficiency-of-the-evidence issue and should be deleted as inappropriate for review here. *Hamling vs. United States,* 418 US 87, 124 (1974).

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[1] In the present Petition, Question I, although not formed as such, was argued in the Reasons for Granting the Writ as being a sufficiency-of-the-evidence issue.

3. Questions I and II should be combined and restated to better define the issue tendered.

4. A third question should be added relating to the representation of petitioner in the Court of Appeals.

5. The Statement of the Case and the Reasons for Granting the Writ will have to be amended accordingly.

6. The order of the Court of Appeals denying the petioner's Motion for Rehearing should be included in the Appendix to show this Court's jurisdiction.

Wherefore, petitioner moves for leave to amend and supplement his Petition for Writ of Certiorari in the manner following.

Respectfully submitted,

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Dated: October 14, 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-129

GARY SUCHY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI

Petitioner hereby amends and supplements the Petition for Writ of Certiorari now on file in this case as follows:

AMENDED JURISDICTIONAL STATEMENT

The Judgment of the Court of Appeals was entered on April 2, 1975. An untimely Motion for Rehearing was denied on June 5, 1975 (Appendix E, infra). The original Petiton for Writ of Certiorari was filed on July 23, 1975. Jurisdiction is conferred upon this Court by 28 USC 1254. This Petition is out of time as explained in the Reasons for Granting the Writ.

AMENDED QUESTIONS PRESENTED FOR REVIEW[1]

I.

Where a defendant is tried before a jury on charges of conspiracy and three related substantive offenses and the government fails to prove the conspiracy charge, should the defendant be granted a new trial on the substantive counts when substantial hearsay, admissible only on the theory of conspiracy, was put before the jury?

II.

Where the appellant in a criminal case unwittingly selects a nonlawyer to represent him on appeal and as a result substantial trial errors are not brought to the attention of the Court of Appeals, should this Court, in the exercise of its supervisory powers over lower federal courts, remand the case to the Court of Appeals for reargument?

[1] Questions I and II of the original Petition are combined as Question I. Question II is added by this Supplement.

AMENDED STATEMENT OF THE CASE

Petitioner was tried on a four-count indictment naming him as the only defendant and charging a conspiracy to violate and substantive violations of the Controlled Substances Act. 21 USC 841.

The case against petitioner rested substantially upon the testimony of Bernard Taylor, an undercover agent with the Narcotics Section of the Detroit Police Department. Taylor had been investigating one Luther Gist and Gist's Party Store in Detroit as a possible source of illegal narcotics. Taylor testified over objection that by December 13, 1972, he had managed to purchase heroin from Gist on four or five occasions. He said he met Gist on the evening of December 13 at the Party Store in an effort to arrange another purchase. Gist told Taylor that he had been in contact with his source and that he would be able to deliver an eighth of a kilogram of heroin the next day. Gist, Taylor claimed, then described his source as a Caucasian, small in frame, a hillbilly type with long hair, whose first name was Gary.

The next morning, December 14, at 11:00 a.m., with the surveillance crew in place, Officer Taylor said that he went into the store. He related that Gist said the heroin had not been delivered. Taylor said that he then told Gist that he would wait outside in his car and, when Gist's source arrived, he would come in and get a sample and take it out to his companion who would test it and then come back and consummate the purchase. Officer Taylor said that he then

went outside and notified the surveillance crew that a Caucasian, hillybilly type would deliver the heroin at 12:30.[2]

At 12:30 petitioner drove up in a 1969 Pontiac, parked and entered the store. Officer Taylor got out of his car and followed him in. He observed petitioner talk to Gist but could not hear what was said. Petitioner then left and went back to his car. Taylor testified that Gist then told him, "That was my man, Gary. He's got the eighth of a kee in the car for me now."

Petitioner returned to the store in a minute or two carrying a large picture and a white paper bag. Gist and Taylor followed petitioner to the rear of the store where Gist introduced Taylor to petitioner as James. Petitioner, Taylor said, gave the bag to Gist. Gist and Taylor then went to the basement of the store with the bag, where, Taylor said, Gist quoted him a price of $3900. Taylor said he wanted a sample first, so Gist reached into the bag and pulled out a plastic bag containing an off-white powder and gave a little to Taylor in a piece of tinfoil. Taylor took the sample out to the car and, after he and Agent Smith tested it, signaled the surveillance crew. While Smith and Taylor waited outside, the crew entered the store and arrested Gist and petitioner. No narcotics were recovered from petitioner.[3]

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[2] Taylor's testimony on this point was substantially contradicted by that of Special Agent Smith of the Drug Enforcement Administration. He said there was a meeting of the surveillance crew at approximately noon and that the actual operation began at about 12:15 when he and Officer Taylor arrived on the scene together in an undercover vehicle.

[3] When arrested, petitioner was seated on the third or fourth step from the top of a stairway to a second-floor apartment over the store. Partially under a locked door were two manila envelopes. The arresting officer broke the door to retrieve the envelopes, one of which contained 21.6 grams of heroin. Count II charged petitioner with possession of that heroin. The jury found him guilty of simple possession.

Petitioner's objection to Taylor's testimony of prior narcotic purchases from Gist was overruled, but the trial judge did instruct the jury at that time:

> These statements that are made in conversations with Mr. Gist, for example, who was an alleged co-conspirator, is not relevant unless it is established to your satisfaction that first a conspiracy is proved, that a conspiracy did exist; second, that Mr. Suchy was a member of that conspiracy; and, thirdly, that the statement that is now being given to you in evidence was a statement made in furtherance of that conspiracy. Otherwise, of course, this testimony would not be admissible, because it is between two people and doesn't involve Mr. Suchy unless you first find that there is a conspiracy and Mr. Suchy was a member of that conspiracy.

In response to subsequent objections on the grounds of hearsay, the Court indicated that any further limiting instructions would come at the conclusion of the trial.

Petitioner testified in his own behalf. He was 31, married seven years, and had worked in the grocery business since he was 11. He and his father owned Suchy Market, a party store in Detroit about a mile and a half from Gist's store. He and his father had planned to open another grocery store and sell their party store. Petitioner had several conversations with Gist, negotiating for Gist to purchase Suchy Market.

Peitioner testified that he went to Gist's store about lunchtime and stayed about five minutes. He bought a can of beer which he was drinking. He went out to the car to get a painting that he wanted to sell to Gist, taking the

can of beer with him in a white bag (Michigan law required beer and wine merchants to bag all purchases leaving the premises). He returned to the store with the painting and was sitting in the back room on a case of beer when ten or twelve officers came to the side entrance demanding admission. He let them in. He claimed that the officers made him sit down on the stairway, perhaps three steps from the bottom. He denied having narcotics or having any agreement with Gist concerning narcotics.

After several hours of deliberation on a Friday, the jury requested additional instructions. They were given on Monday morning, and on Monday afternoon the jury convicted petitioner on all four counts.[4]

The Court of Appeals reversed the conviction on the conspiracy Count I, ruling:

> The Court is of the opinion that there was insufficient evidence, apart from the hearsay testimony of police officer Taylor, from which a prima facie case of conspiracy could be made out against the defendant Suchy. Accordingly, for this reason his conviction on Count I cannot stand.

In affirming the three substantive convictions, the Court said:

> Mindful of the very real dangers which attend the trial of a defendant on both conspiracy and substantive charges and especially those dangers which exist when there is an acquittal on the conspiracy charge, the Court is nevertheless of the opinion that the direct and positive evidence of the defendant's guilt on the substantive charges was sufficient and independent of the hearsay evidence so as not to require a remand and new trial on the substantive charges. A review of the record indicates that none of the hearsay evidence admitted to establish the conspiracy prejudiced Suchy's right to a fair trial on the substantive counts. [Citations omitted.]

[4] On Count II they found petitioner guilty of the included offense of possession. He was sentenced to concurrent 5-year sentences on each of the felony counts and 1-year concurrently on the misdemeanor count.

PETITIONER'S REPRESENTATION IN THE COURT OF APPEALS

On appeal to the Sixth Circuit, petitioner and his family engaged the services of one Sterling Brown. Unbeknown to petitioner, Mr. Brown was not a lawyer, had never been inside a law school, and acquired whatever legal knowledge he had while an inmate of a Federal penitentiary and, upon release, his employment for six or seven months in the Federal Defender's office in Detroit.

Brown arranged for an attorney in Detroit, Mr. James O'Connell, to appear as counsel of record. Petitioner did

[5] The facts set out in this portion of our Statement are almost entirely not a matter of record. Counsel does represent that they are true to the best of their knowledge based upon their investigation which included conferences with petitioner and his family, the attorney of record in the Court of Appeals, the attorney who argued the case orally in the Court of Appeals, the printer of the Petition for Certiorari, and a review of the private files turned over to counsel upon substitution. In our Reasons for Granting the Writ, we argue that these facts should be considered by the Court even though not a matter of record.

not meet or have any contact with Mr. O'Connell until after his appeal was decided.

Brown apparently worked in Mr. O'Connell's office as a research analyst, the title given him on the stationery of Mr. O'Connell. On November 1, 1974, Mr. Brown terminated his relationship with Mr. O'Connell and moved to a Detroit suburb where he shared offices with another attorney, Mr. James Thomas, and operated an enterprise known as Benchmark Research. In January, 1975, petitioner's brief in the Court of Appeals was filed by Brown. Brown selected the issues for review and wrote the brief himself. He arranged for Thomas to argue the case in the Court of Appeals. Several substantial trial errors went unmentioned in petitioner's brief in the Court of Appeals.[6]

Petitioner met Mr. O'Connell for the first time in June or July, 1975, in connection with Mr. O'Connell's motion in this Court to recall the mandate. Although Mr. O'Connell prepared that motion, he had nothing to do with the Petition for Certiorari which we now seek to amend and supplement. It was drafted and filed by Brown.[7]

[6] To avoid making this Statement argumentative, we leave discussion of those substantial issues to the Reasons for Granting the Writ.

[7] For parallel conduct of Mr. Brown, see *Meretsky vs. United States*, No. 74-1562, Petition for Certiorari denied October 6, 1975, pp. 11-12 of the Petition. Other aspects of Mr. Brown's "law practice" are currently under investigation by the Sixth Circuit in disciplinary proceedings against two Detroit lawyers. Mr. Brown was convicted in the Cincinnati Federal District Court of violating 18 USC 1001 in connection with his oral argument of an appeal in the Sixth Circuit. He has been indicted in New York for forging the name of a New York attorney to pleadings in the Second Circuit.

REASONS FOR GRANTING THE WRIT

I.

WHEN THE PROSECUTION OBTAINS A CONVICTION ON A SUBSTANTIVE OFFENSE WITH THE AID OF SUBSTANTIAL HEARSAY ADMISSIBLE ONLY ON THE THEORY OF AN UNPROVEN CONSPIRACY CHARGE, A NEW TRIAL SHOULD BE GRANTED AT WHICH THE HEARSAY WOULD BE EXCLUDED. ONLY SUCH A PER SE RULE WILL DETER PROSECUTOR ABUSE OF THE CONSPIRACY CHARGE.

This Court has given abundant warnings of the dangers to a fair trial from the indiscriminate use of the conspiracy charge.[8] Yet, to an extent that should not be tolerated in our system of justice, the United States attorneys have ignored these warnings. Today, some prosecutors almost reflexively add conspiracy counts to charges of substantive offenses solely to gain the "procedural advantages" of a conspiracy trial, rather than out of any real need growing out of the nature of the crime.

The studied abuse of the conspiracy charge in this case stands out in stark detail because of the unusual pretrial proceedings. Petitioner and Gist were initially charged only with the substantive offense of possession with intent to distribute ¼ [⅛?] kilo of heroin.[9] Gist died January 11, 1973. On March 6, the government dismissed the Complaint against petitioner, and on April 4 he was indicted

[8] *Krulewitch vs. United States*, 336 US 440 (1949); *United States vs. Falcone*, 311 US 205 (1940); *Grunewald vs. United States*, 353 US 391 (1957).

[9] In a Complaint filed December 15, 1972, the day following arrest.

alone on the conspiracy count and three substantive counts.[10]

Why the conspiracy count? Enhancement of punishment was not involved. All of petitioner's activities upon which prosecution was based occurred on December 14 within approximately half an hour, and sentence on each count would have had to be concurrent. The conspiracy count was not needed to effect joinder of defendants.[11] The only reason was that the prosecution wanted the advantage of being able to convict petitioner with hearsay.

If Certiorari is granted, we would urge a per se rule of prejudice, requiring that wherever the government is able to put hearsay before the jury solely because of an unproven conspiracy count, any conviction on substantive counts would be set aside. Such a rule would vindicate an important right of a defendant on trial in a federal court to have his fate determined only upon the basis of evidence competent under the federal evidentiary rules or the Sixth Amendment right of confrontation. Such a rule would also accomplish what this Court's warnings have failed to do: provide a certain deterrent to the bringing of flimsy conspiracy charges where prosecution for the substantive offense would be an adequate remedy. Finally, a per se rule would avoid inconsistent results at the trial level and relieve the appellate courts of the task of making case-by-case redeterminations of the degree of prejudice from incompetent hearsay.

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[10] Gist was named as co-conspirator. Count II related to the heroin found in the room at the top of the stairs. Count III and Count IV charged possession of and distribution of the 1/8 kilo of heroin.

[11] Another frequent abuse of the conspiracy charge to promote assembly line justice under the euphemism of judicial economy.

Per se rules have great utility in substantive civil law: nuisance, libel, and restraint of trade, to mention a few. Rule 8 (b) FRCrP codifies a procedural per se rule governing joinder of defendants.[12] See also the concurring opinion of Justice Stewart in *Chapman vs. California,* 386 US 18 (1967) for additional examples of per se rules in criminal cases.

The issue tendered by this Petition is important to the administration of justice even though we can point to no conflict of Circuits on the issue. Indeed, there is very little case law to support us specifically—only *United States vs. Johnson,* 334 F Supp 982 (DC Mo 1971), and the sometime rule of the Sixth Circuit expressed in *United States vs. Lucido,* 486 F 2d 868 (CA 6 1973).[13]

Even if the Court is not prepared to adopt a per se rule of prejudice, there is sufficient indication of substantial actual prejudice to petitioner from the inadmissible hearsay to allow this Court to write an instructive opinion.[14]

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[12] The collollary to Rule 8(b) is that, unless joinder is authorized by that Rule, as it has been explained here, defendants may not be tried together. This is no technical limitation, but it is intended to prevent mass trials. If joinder is improper, severance is not a mere matter of discretion, and the overwhelming weight of authority is that a joint trial cannot be regarded as harmless error.

1 Wright, *Federal Practice and Procedure,* §144 (pp. 327-329).

The Sixth Circuit alone holds that 8(b) joinder is discretionary. *United States vs. Meretsky,* — F 2d — (decided March 17, 1975), certiorari denied October 6, 1975, 74-1562.

[13] In *Lucido* the government sought and obtained an extension of time to move for a rehearing in order to consult with the Solicitor General on the advisability of seeking review of that decision. At the very least, then, the issue verges on being important.

Perhaps the reason there aren't more cases in point is from lack of recognition of the issue by counsel rather than the lack of opportunity to raise it. Cf. *United States vs. Ridley,* 519 F 2d 791 (CA 6 1975) (appeal of Greenlee).

[14] Compare *United States vs. Arnold, Schwinn and Co,* 388 US 365, 368 (1967).

The government was able to use the hearsay evidence successfully in two ways: first, in successfully urging the trial judge to deny petitioner's Motion for Judgment of Acquittal; and second, in arguing the hearsay to the jury as proof of the conspiracy. Thus, both the judge and jury—both the instructor and the instructed—ignored the limiting instruction given once during the trial and repeated in the final instructions to the jury, showing that Justice Jackson was right in his oft-cited concurring opinion in *Krulewitch.*[15]

The hearsay which we challenge implicated petitioner directly. This is another reason for holding that there was actual prejudice to petitioner. In Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis,* 85 Harvard LR 1378 (1972), the author proposes certain rules of evidence for conspiracy trials, one of which would bar hearsay evidence directly implicating a defendant even if a conspiracy charge were supported by other evidence. He puts the Rule this way, at 1396:

> A declaration [by an alleged co-conspirator] ostensibly against the declarant's penal interest is inadmissible to the extent it implicates someone other than declarant in the criminal enterprise.

In support of this Rule the author says:

> The invocation of a name may be gratuitous, may be deliberately false in order to gain ad-

[15] "The naive assumptions that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction." [Citation omitted.]

336 US at 453.

> vantages for the declarant greater than those that would flow from naming a real participant or no one at all, may be a cover for concealment purposes . . . One can imagine a political activist being tempted to "inform" a listener he wishes to impress that he and, say, Abbie Hoffman, are working on "a deal that'll blow this town wide open!"

One can also imagine a Luther Gist who has found a steady customer in Officer Taylor and wants to conceal his source of heroin from Taylor—so that Taylor cannot deal directly and eliminate Gist's middle-man profits—by falsely identifying petitioner as his source.[16]

Much of the damaging hearsay which Officer Taylor related came, he claimed, at 11:00 on the morning of Decem-

[16] *Dutton vs. Evans,* 400 US 74 (1970), was a habeas corpus inquiry into a State conviction and necessarily only involved the Sixth and Fourteenth Amendments. Consequently, the prisoner there bore a heavier burden than we do. Nonetheless, the hearsay evidence against petitioner here certainly meets the "crucial and devastating" criteria of Dutton.

The trial of this case was not governed by the new Federal Rules of Evidence, but their enactment might be considered to detract from the importance of the issue we present. But the legislative history of Rule 804(b)(3) shows that this is not so. The house proposed the following addition to that section:

> A statement or confession offered against the accused in a criminal case made by a codefendant or other person implicating both himself and the accused, is not within this exception.

This sentence was deleted in the Senate version. In adopting the Senate version the Committee on Conference wrote:

> The conferees agree to delete the provision regarding statements by a codefendant, thereby reflecting the general approach in the Rules of Evidence to avoid attempting to codify constitutional evidentiary principles.

See generally 4 Weinstein's Evidence, 804-11 to 804-16.

ber 14. His testimony on this point was substantially contradicted by that of Special Agent Smith. See footnote 2, above. Petitioner, who had no prior criminal record of any kind, testified that he was on the premises for reasons entirely unrelated to narcotics. That a substantial fact question faced the jury is evident from their deliberations on Friday afternoon and most of Monday and their request for additional instructions. The relative strength of the government case is always a consideration in assessing the impact of any trial errors. *Fiswick vs. United States,* 329 US 211, 218 (1946).

Whether the issue we tender is decided on Sixth Amendment grounds or on federal evidentiary principles is immaterial to petitioner. Judged either by the harmless-error rule[17] or the harmless-beyond-reasonable-doubt rule of *Chapman,* petitioner's trial was unfair.

II.

THE INADEQUACY OF PETITIONER'S REPRESENTATION IN THE COURT OF APPEALS REQUIRES THAT THE CASE BE SENT BACK THERE FOR REHEARING.

The facts upon which this issue is based are not a matter of record. But this is usually so when inadequacy of representation is an issue. *Brubaker v. Dickson,* 310 F 2d 30, 32 (CA 9 1962). This Court has never hesitated to exercise its supervisory power over lower federal courts upon the basis of serious allegations made for the first time in this Court. *Mesarosh vs United States,* 352 US 1 (1956)[18]; *Kolod vs United States,* 390 US 136 (1968). The Court's

[17] Rule 52 FRCrP. *Kotteakos vs. United States,* 328 US 750 (1946).

[18] Even the dissenters in *Mesarosh* agreed that a remand was proper.

jurisdiction is not restricted because the issue was not before the Court of Appeals. This type of error should be noticed no matter how it receives the Court's attention. Rule 40(1)(d)(2) of this Court's rules. *Silber vs United States,* 370 US 717 (1962).

While appellate review is not guaranteed by our Constitution, certainly it is an important statutory right. It cannot be diminished by a denial of counsel without creating independent constitutional issues. *Griffin vs Illinois,* 351 US 12 (1956)[19]. Here, the representation in the Court of Appeals was grossly inadequate. Substantial trial errors were not raised.

None of the trial errors may merit the attention of this Court, but certainly petitioner had a right to have them considered in the Court of Appeals. For example, the Government introduced evidence that handguns were seized from Gist's store. An objection to this was sustained, but the jury heard the evidence. The Sixth Circuit condemns such evidence. *Giordano vs United States,* 185 F 2d 524 (1950). Without objection, the government introduced evidence that petitioner had $1200 on him when arrested. This, too, the Sixth Circuit condemns. *United States vs Dean,* 435 F 2d 1 (1970). See also *Williams vs United States,* 168 US 382 (1897).

A most fundamental error was the inadequate treatment of reasonable doubt in the jury instructions. It was defined

[19] Cf. *Morrissey v. Brewer,* 408 US 471 at 481 (1972):

> This Court has now rejected the concept that Constitutional rights turn upon whether a governmental benefit is characterized as a "right" or as a "privilege". Whether any procedural protections are due depends on the extent to which an individual will be condemned to suffer grievous loss.
>
> [Citations and interior quotations omitted.]

as "the kind of doubt that would make a reasonable person hesitate to act." Later, the trial judge said, "Proof beyond a reasonable doubt [is] proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in your own affairs." This latter instruction, modified from Devitt and Blackmar, *Federal Jury Practice and Instructions,* (2nd ed) §11.01, to omit "in the most important of your affairs" is almost the very one criticized in *Holland vs United States,* 348 US 121, 140 (1954).[20] A reasonable person might select a restaurant upon the recommendation of a stranger or casual acquaintance, but in home, career, or spouse selection—the most important and serious affairs of life—no reasonable person would not demand more evidence. The Court gave an instruction on presumption of innocence cast in terms of reasonable doubt rather than as a separate concept, again following Devitt and Blackmar, §11.01, more or less. The two concepts, though closely related, are distinct and should be charged separately. *Coffin vs United States*, 156 US 432 (1895). (No objection to these instructions was made, and any claim in the Court of Appeals would have had to be made under Rule 52 FRCrP.)

Finally, petitioner should have the opportunity, through competent counsel, to attempt to persuade the Court of Appeals that on the *Lucido* issue, the hearsay admitted under the unproven conspiracy charge was "crucial and devastating." Who knows but, if we are given that opportunity, it may be the government's turn to come knocking at this Court's door, (See footnote 13 above).

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[20] At least, the authors had the good grace in the second edition to remove the citation of Holland as supporting such an instruction.

CONCLUSION

The Petition is out of time by at least three weeks and more if the Court considers that the Petition for Rehearing in the Court of Appeals was also out of time. Nonetheless the Court does have jurisdiction to consider it, *Taglianetti vs United States,* 394 US 316 (1969); *Schacht vs United States,* 398 US 58 (1970), [a delay of 101 days in filing the Petition]. The delay was caused by the inadequate representation which the Petition challenges and which representation continued right into this Court. Only a sophist would argue that petitioner's inadequate representation thus far denies him the right to challenge that inadequate representation.

The Petition for Certiorari should be granted to consider the important hearsay question presented. If the Court is not persuaded to consider that issue now and is not prepared to address the second issue in plenary review, at the very least the Judgment below should be vacated, and the case remanded to the Court of Appeals for a determination of whether petitioner was so inadequately represented that the case should be rebriefed and reargued.

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Dated: October 15, 1975

APPENDIX E

(United States Court of Appeals for the Sixth Circuit)

No. 74-1937

(Filed June 5, 1975)

United States of America,
Plaintiff-Appellee,
v.
Gary Suchy,
Defendant-Appellant.

ORDER

Before: Celebrezze, Miller and Engel, Circuit Judges.

This cause came on for hearing on the petition for rehearing with a suggestion that it be reheard *en banc.*

It appearing to the court that no judge has requested that a vote be taken on said suggestion, the petition for rehearing was considered by the panel and was determined not to be well taken.

It is therefore Ordered that the petition for rehearing be denied.

Entered By Order Of The Court

/s/ John P. Hehman
Clerk